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FORE CROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 625

J. H. JEFFERS,

Petitioner,

vs.

**S. J. ISAACKS, Independent Executor of the Last Will and
Testament of Martin V. Jeffers, Deceased,**

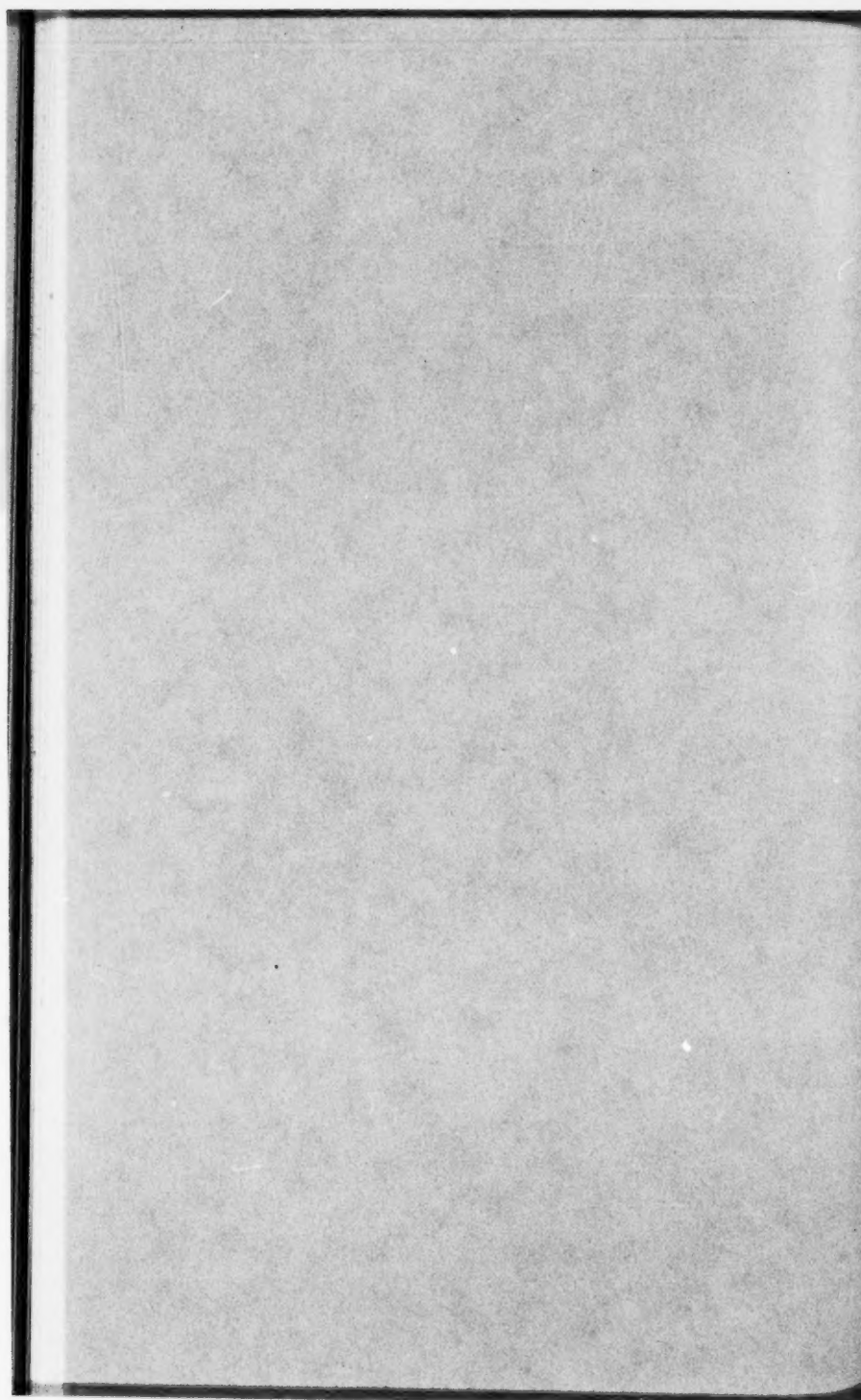
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT
AND BRIEF IN SUPPORT OF PETITION**

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POINT I.

REASONABLE DILIGENCE IN THE SERVICE OF SUMMONS MUST BE EXERCISED TO PREVENT THE RUNNING OF THE STATUTE OF LIMITATIONS, AND NO SUCH DILIGENCE WAS EXERCISED BY RESPONDENT UNTIL THE ISSUANCE OF THE SECOND ALIAS SUMMONS ON MAY 18TH, 1942, WHICH WAS SERVED, BUT THE STATUTE OF LIMITATIONS HAD RUN ABOUT APRIL 1ST, 1942

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POINT II.

INASMUCH AS THE CATTLE INVOLVED HAD BEEN TRANSFERRED BY RESPONDENT'S TESTATOR TO A PARTNERSHIP ABOUT TEN YEARS PRIOR TO THE FILING OF THE COMPLAINT AND HAD BEEN RUN BY SUCH PARTNERSHIP, ALL THE MEMBERS OF THE PARTNERSHIP WERE INDISPENSABLE PARTIES TO THE PROCEEDING SEEKING AN ACCOUNTING FOR THE HANDLING OF SUCH CATTLE

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S. J. ISAACKS, Independent Executor of the Last Will and
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

**SUMMARY STATEMENT OF THE
MATTER INVOLVED**

This is a suit in equity brought in the United States District Court for the District of New Mexico by Respondent against Petitioner. The original Complaint named Respondent and two others as Plaintiffs, and Petitioner and nine others as Defendants. Jurisdiction was based solely on diversity of citizenship, and the Complaint sought a partnership accounting (Transcript, page 3).

The original Complaint was filed March 8th, 1940 (Transcript, page 3); summons issued the same day, and was returned unserved by the Marshal June 26th, 1940, because no deposits of that official's fees and expenses were made, although demand was made for the payment of these items (Transcript, pages 16, 153). Alias summons issued July 20th,

1940, and was returned unserved by the Marshal August 12th, 1941, for the same reason (Transcript, pages 17, 154). A second alias summons issued May 18th, 1942, and was served on Petitioner June 19th, 1942 (Transcript, page 19).

The New Mexico statute of limitations applicable (Section 27-104 of the 1941 Compilation), and which is hereinafter set out, specified a period of four years for the bringing of an action of the kind here involved. It is undisputed that this statute began to run about April 1st, 1938, when Petitioner stated to Respondent that Respondent's testator had no interest in the cattle involved and refused to make an accounting. This is alleged in Paragraph IX of Respondent's Second Amended Complaint (Transcript, page 42). Respondent so testified (Transcript, pages 65, 66), and Petitioner likewise so testified (Transcript, page 119). This is definitely recognized in the opinion of the Circuit Court of Appeals (Transcript, page 247) and in the dissenting opinion (Transcript, page 252).

The original Complaint alleged the existence of a partnership between Martin V. Jeffers (Respondent's testator) and Petitioner and six other named parties for the conduct of an extensive cattle business. It set up an alleged partnership agreement, agreed on but not signed, and sought a partnership accounting (Transcript, pages 3, 15).

All the Plaintiffs except Respondent, and several of the Defendants were dismissed on Plaintiff's Motion (Transcript, pages 22, 23), and Amended Complaint was filed August 3rd, 1942, in which Respondent was sole Plaintiff, and Petitioner and seven other parties were Defendants (Transcript, page 24). This Amended Complaint set up the same partnership and sought an accounting.

Petitioner's Amended Answer to this Amended Complaint set up, among other defenses, the absence of indispensable parties (Transcript, page 34), which defense was sustained (Transcript, page 37). Respondent thereupon dismissed all of the Defendants except Petitioner (Transcript, page 38), and filed a second Amended Complaint (Transcript, page 40). In this Second Amended Complaint, Respondent abandoned all allegations with respect to a partnership and sought recovery from Petitioner as a trustee, alleging that cattle in two speci-

ned brands were turned over to Petitioner as trustee in 1906. Petitioner's Answer to the Amended Complaint set up, among others, the defenses of the statute of limitations and the absence of indispensable parties (Transcript, page 48).

In the course of the trial in the District Court, it was admitted that Respondent's testator, on October 3rd, 1930, transferred the two brands described in the Second Amended Complaint and the cattle to J. H. Jeffers and Sons (Transcript, pages 77, 112), a partnership composed of Petitioner and six others (Transcript, pages 155, 113).

The District Court held, in view of this transfer, that all the members of the partnership were indispensable parties and dismissed the Complaint (Transcript, page 55). The District Court ruled against Petitioner on the question of the statute of limitations (Transcript, page 234).

Respondent appealed to the Circuit Court of Appeals for the Tenth Circuit, and that Court reversed the judgment of the District Court. The opinion of that Court and its judgment are dated July 26th, 1944 (Transcript, pages 245, 253).

That Court held that Rule 3 of the Federal Rules of Civil Procedure changed the pre-existing Rule, as established by the decisions of this Court, that in order to interrupt the running of the statute of limitations, there must be not only the filing of the Complaint in time but no unreasonable delay in the service of summons. That Court also held that Respondent might recover against Petitioner alone without joining the other members of the partnership of J. H. Jeffers and Sons.

Bratton, C. J., dissented on both grounds (Transcript, page 251).

Motion for rehearing was filed in the Circuit Court of Appeals August 15th, 1944 (Transcript, page 255) and was denied August 28th, 1944 (Transcript, page 259).

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment herein questioned under Section 240 of the Judicial Code, as amended (U. S. C., Title 28, Section 347). The jurisdiction of the District Court was based solely on diversity of citizenship, which is not questioned, and that

the amount in controversy greatly exceeded \$3,000.00, which is likewise not questioned.

While the judgment of the Circuit Court of Appeals is not final in that it directs further proceedings in the District Court (Transcript, page 253), a decision of either of the points raised by Petitioner in his favor will finally dispose of the case; and finality of the judgment of the Circuit Court of Appeals is not required by the Section of the statute above referred to. *Fuller Company vs. Otis Elevator Company*, 245 U. S. 489.

QUESTIONS PRESENTED

The questions here presented are:

1. Has Rule 3 of the Federal Rules of Civil Procedure so changed the rule established by the decisions of this Court that the mere filing of a complaint, with no attempt to make service of summons for more than two years, interrupts the running of the statute of limitations?
2. Where cattle have been transferred to a partnership and run by the partnership for approximately ten years, may the transferor seek an accounting of the cattle operations in a proceeding against one only of the partners without joining the other members of the partnership?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of the Supreme Court; that is, it has given an interpretation to Rule 3 of the Federal Rules of Civil Procedure in conflict with *Linn and Lane Timber Company vs. United States*, 236 U. S. 574.
2. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by the Supreme Court; that is, the Circuit Court of Appeals has decided important questions of practice under the Rules of Civil Procedure which should be settled by this Court. The proper practice under the Rules of Civil Procedure

has been recognized as a proper basis for certiorari in *Leishman vs. Associated, etc. Company*, 318 U. S. 203; *Montgomery Ward vs. Duncan*, 311 U. S. 243.

WHEREFORE, Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case entitled, on its docket, "No. 2867, S. J. Isaacks, Independent Executor of the Last Will and Testament of Martin V. Jeffers, Deceased, Appellant, vs. J. H. Jeffers, Appellee," to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such other relief as to this Court may seem proper.

Dated October 20th, 1944.

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